NO. 33091

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

DANIEL R. STRAHIN,

Appellant,

vs.

From the Circuit Court of
Barbour County, West Virginia
CIVIL ACTION NO. 99-C-7

EARL SULLIVAN and
FARMERS & MECHANICS
MUTUAL INSURANCE COMPANY
OF WEST VIRGINIA, INC.,

Appellees.

BRIEF OF THE APPELLANT

Paul T. Farrell, Jr., Esquire
(W. Va. State Bar #7443)
GREENE, KETCHUM, BAILEY,
WALKER, FARRELL & TWEEL
419 Eleventh Street
Post Office Box 2389
Huntington, West Virginia 25724

Stephen D. Annand, Esquire
(W. Va. State Bar #150)
THE COCHRAN FIRM, DC
1100 New York Avenue, NW
Suite 250, West Tower
Washington, D.C. 20005

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

STATUTES

FOREIGN CASES

SECONDARY SOURCES

E. H. Schopler, *Conclusiveness and Effect, Upon Surety, of Default or Consent Judgment against Principal*, 59 A.L.R.2d 752, (1958)

E. H. Schopler, *Right to Appellate Review of Consent Judgment*, 69 A.L.R.2d 755, (1960)

Sheldon R. Shapiro, *Modern Views of State Courts as to Whether Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect*, 91 A.L.R.3d 1170, (1979)

Restatement (Second) of Judgments, §57-58 (1982)

1 R. Long, The Law of Liability Insurance § 5.14 (1983)

Stuart N. Rappaport, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. Ill. L. Rev. 731 (1987)

Michael J. Brady, et al., *Demise of the Stipulated Judgment as a Basis for Bad Faith Actions*, 60 Def. Couns. J. 59 (1993)

J. Michael Phillips, *Looking Out for Mary Carter: Collusive Settlement Agreements in Washington* Tort Litigation, 69 Wash. L. Rev. 255 (1994)

Steven L. Pain, et al., *California Practicum: Recent Developments in California Insurance Law: Enforceability of Stipulated Judgments Against Insurance Carriers*, 22 Pepp. L. Rev. 1017 (1995)

Richard D. English, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith In, or Comply with Agreement made in Mediation*, 43 A.L.R.5th 545, (1996)

Stephen S. Ashley, *Bad Faith Actions: Liability & Damages*, §§ 2:04-06 (2d. ed. 1997)

Timothy D. Howell, *So Long "Sweetheart"- State Farm & Casualty Co. v. Gandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 St. Mary's L. J. 47 (1997)

Chris Wood, Note: *Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 Tex. L. Rev. 1373 (1997)

J. Harris, Note: *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 Drake L. Rev. 853 (1999)

Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 Drake L. Rev. 853 (1999)

Ellen S. Pryor, *The Tort Liability Regime and the Duty to Defend*, 58 Md. L. Rev. 1 (1999)

Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 Den. U. L. Rev. 29 (2000)

Steven Plitt, *The Evolving Boundaries of Damron/Morris Agreements: A Search for the Missing Link, A Judicial Determination of the Length of a Reasonable Person's Arm, and Other Progressive Issues*, 35 Ariz. St. L.J. 1331 (2003)

1-3 Insurance Bad Faith Litigation § 3.08: Recoverable Damages for Breach of Duty to Settle (2004)

1-3 Insurance Bad Faith Litigation § 3.14: Insurer's Procedural Options When Questions of Coverage Arise (2004)

I. INTRODUCTION

This case is on appeal for the second time. See Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (W. Va. 2004) (hereinafter "*Strahin I*"). *Strahin I* upheld a jury verdict in favor of the Appellant (Plaintiff Below) in excess of the Defendant's insurance policy limits. The Defendant assigned his Shamblin[1] claim to the Appellant in exchange for a "covenant not to execute." The Circuit Court thereafter granted partial summary judgment in favor of the insurer holding the *Assignment and Covenant Not to Execute* rendered the Shamblin first-party bad faith claim unenforceable.

The practice of assigning a first-party insurance bad faith claim[2] is commonplace in West Virginia and has been mentioned in the procedural history of several reported cases. However, the instant matter is the first opportunity the Court has taken to examine the merits and mechanics of such a claim.[3]

The holding by the Circuit Court is contrary to precedent from nearly every other jurisdiction in the United States, is a misapplication of the minority rule and is bad public policy. For the reasons set forth below, this Honorable Court should reverse the holding by the Circuit Court and remand the matter for further proceedings.

---

[1] See Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766 (1990).

[2] "A first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured." State ex rel. Allstate Ins. Co. v. Gaughan, 203 W. Va. 358, 369, 508 S.E.2d 75, 86 (W. Va. 1998).

[3] The closest indication of this Court's disposition regarding the issue can be found in Jackson v. State Farm, 215 W. Va. 634, 600 S.E.2d 346 (W. Va. 2004), wherein the Court "agree[d] with the reasoning" of Bolden v. O'Connor Café of Worcester, Inc., 734 N.E.2d 726 (Mass. App. Ct. 2000) in a bad faith case. The Bolden case involves a near identical procedural history regarding the assignment of an excess verdict coupled with a covenant not to execute. Bolden is the progeny of Campione v. Wilson, 661 N.E.2d 658 (Mass. 1996) which directly conflicts with the reasoning of the Circuit Court of Barbour County in the underlying declaratory judgment action.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This civil action originates from a jury verdict in favor of the APPELLANT, Daniel R. Strahin ("Appellant"), against Defendant, Earl Sullivan ("Sullivan"), in the amount of One Million Sixty Thousand Five Hundred Fifty-Six Dollars ($1,060,556.00). The jury verdict was upheld on appeal in *Strahin I* and was in excess of Sullivan's liability policy limits of One Hundred Thousand Dollars ($100,000.00) purchased through APPELLEE, Farmers & Mechanics Mutual Insurance Company of West Virginia, Inc. ("Farmers & Mechanics").

Appellant and Sullivan entered into an *Assignment and Covenant Not to Execute* prior to verdict whereby Sullivan assigned to Appellant his Shamblin claim to collect the excess judgment against Farmers & Mechanics. In return, Appellant agreed not to execute the excess judgment against the personal assets of Sullivan.

The Circuit Court of Barbour County, the Honorable Alan Moats presiding, entered an *Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Motion for Summary Judgment as to "Shamblin" Cause of Action* (hereinafter "*Order Granting Summary Judgment*") holding that the terms and timing of the "covenant not to execute" preclude enforcement of the excess verdict claim under Shamblin against Farmers & Mechanics.

Your Appellant asserts error from the *Order Granting Summary Judgment.*

III. STANDARDS OF REVIEW

This appeal arises out of the entry of summary judgment in favor of Farmers & Mechanics. "A circuit court's entry of summary judgment is reviewed *de novo*." Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994). In other words, this Honorable Court

"review[s] a circuit court's award of summary judgment under the same standards that the circuit court initially applied to determine whether summary judgment was appropriate." Williams v. Precision Coil, Inc., 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

The Circuit Court determined the *Assignment and Covenant Not to Execute* rendered the Shamblin first-party bad faith claim unenforceable. The issues on appeal involve questions of fact and law. "We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Burgess v. Porterfield, 196 W. Va. 178, 187, 469 S.E.2d 114, 123 (1996).

This appeal also involves the interpretation of the term "legally obligated to pay" in an insurance policy. "The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." Bowyer v. Hi-Lad, Inc., 216 W. Va. 634, 609 S.E.2d 895, Syl. Pt. 4 (2004); Riffe v. Home Finders Associates, Inc., 205 W. Va. 216, 517 S.E.2d 313, Syl. Pt. 2 (1999).

IV. STATEMENT OF FACTS

1. The factual and procedural history of the instant matter spans six years. The history set forth below is compiled from the reported decision in *Strahin I*, the findings of fact from the *Order Granting Summary Judgment* and the record below.

2. The civil action underlying this appeal arose from a shooting incident that occurred on May 31, 1998, outside a house being built by Sullivan. On that day, Robert Cleavenger, armed with a high-powered rifle, shot into Sullivan's car where Appellant was

seated, causing serious and permanent bodily injury. Robert Cleavenger pleaded guilty to two counts of malicious assault and served a sentence in the state penitentiary.

3. Based on the shooting incident, Appellant filed a lawsuit in February 1999 against Robert Cleavenger and Sullivan. Appellant's complaint alleged, among other things, that the injuries he sustained from the shooting were proximately caused by Sullivan's negligence in light of the foreseeable conduct of Robert Cleavenger under the facts of the case.

4. At the time of the May 31, 1998 incident, Sullivan was insured by a homeowner's insurance policy issued by Farmers & Mechanics with policy limits of One Hundred Thousand Dollars ($100,000.00).

5. On April 5, 2000, Appellant, through his able counsel, H. Gerard Kelley, Esq., made a formal demand of policy limits in exchange for a full and final release of Sullivan. (R. 163).

6. On September 19, 2000, Appellant again made a formal demand for policy limits in exchange for a full and final release. (R. 164).

7. Farmers & Mechanics refused both offers of settlement. See Farmers & Mechanics *Answer to Second Amended Complaint* at ¶7 on p. 8. (R. 217).

8. Prior to trial, Appellant and Sullivan entered into an *Assignment and Covenant Not to Execute*. (R. 53-55). The terms of the agreement include:

> II. Earl Sullivan does hereby assign to Plaintiffs, their heirs, all representatives and assigns, all of his rights, presently existing or which might hereafter arise, whether in contract or tort, to seek compensation, indemnity, defense, compensatory damages, punitive damages, relating to or arising from the Farmers & Mechanics Policy, including but not limited to all claims based on unfair settlement practices, Bad Faith, or refusal to provide defense and/or indemnity.

III. Earl Sullivan shall take whatever action is reasonably necessary in order that the rights assigned above be preserved, maintained and exercised, including but not limited to giving full cooperation to Farmers & Mechanics Mutual Insurance Company and Nationwide Insurance Company in the defense of the Civil Action.

IV. Plaintiffs, their heirs, legal representatives and assigns, promise, covenant and agree to not execute upon any of the personal assets of Earl Sullivan to recover payment to satisfy any judgment which may hereinafter be acquired by them against Earl Sullivan; and Plaintiffs release and discharge for themselves, their heirs, legal representatives and assigns, Erie Insurance Company and its assigns, from any and all further liability or obligations, claims and demands, or executions whatsoever, in law or in equity, which Plaintiffs ever had or might now have by virtue of any after acquired judgment against Earl Sullivan.

V. This Assignment and Covenant Not To Execute shall in no way affect Plaintiffs' right to seek a judgment in the Civil Action against Earl Sullivan so long as Plaintiffs limit their source of recovery on any such judgment to Farmers & Mechanics Mutual Insurance Company and Nationwide Insurance Company, it being understood that Plaintiffs shall not satisfy any such judgments against the personal assets of Earl Sullivan.

VI. This Agreement is specifically conditioned upon the following:

(a) The parties shall obtain court approval of each and every term of this agreement;

(b) Any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan, shall not be at any time recordable by any party nor at any time become recordable in any county clerk's office in West Virginia or in any other place where it would become a public document;

(c) Any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan shall be self-extinguishing and satisfied in full at the conclusion of five (5) years from any judgment and the date of entry of any such judgment;

(d) Any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan shall be non-assignable by the plaintiffs or any plaintiffs' representative;

(e) If during the five (5) years that any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan is in effect, any monies recovered on behalf of plaintiffs against Farmers & Mechanics Mutual Insurance Company and Nationwide Insurance Company under their respective policies, recovery under both would operate as a full and complete satisfaction of any such judgment. If monies are recovered on only one of said policies and there is a final non-appealable determination under the other policy that no monies are recoverable, then such recovery under the one policy would also operate as a full and complete satisfaction of any such judgment;

(f) Plaintiffs are now and forever prohibited from making any attempt of any kind to satisfy any judgment obtained from the personal assets of Earl Sullivan or from the corporate assets of any company now owned or hereafter acquired by Earl Sullivan and the attempt to recover from Farmers & Mechanics Mutual Insurance Company and Nationwide Insurance Company will be the only attempt made to satisfy any after acquired judgment against Earl Sullivan;

(g) Upon court approval of this settlement and tender of payment to plaintiffs, plaintiffs shall deliver full and final release to Erie Insurance Company in a form satisfactory to Erie Insurance Company.

9. A *Motion for Court Approval of Assignment and Covenant Not to Execute* was heard on February 7, 2001, and the Motion was granted by Order entered on February 26, 2001. (R. 179).

10. A jury trial was scheduled for June 4, 2001, but was continued by agreed order to a later date.

11. A full adversarial jury trial was conducted and a verdict was returned on March 7, 2002, in favor of Appellant against Sullivan in the amount of One Million Sixty Thousand Five Hundred Fifty-Six Dollars ($1,060,556.00). (R. 1-4).

12. Appellant, standing in the shoes of Sullivan via the *Assignment and Covenant Not to Execute*, filed an *Amended Complaint* asserting a Shamblin claim against Farmers & Mechanics. Action on the *Amended Complaint* was stayed pending an appeal of the underlying verdict by Farmers & Mechanics to the Supreme Court of Appeals of West Virginia. (R. 74-75).

13. The jury verdict was upheld on appeal in Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (W. Va. 2004). (R. 76-111).

14. Farmers & Mechanics filed its *Answer* to the *Amended Complaint* and thereafter paid the policy limits of One Hundred Thousand Dollars ($100,000.00). (R.115-124).

15. Farmers & Mechanics filed a *Motion for Summary Judgment* on the grounds that the covenant not to execute rendered the Shamblin claim unenforceable. (R. 131-145). Responsive pleadings were timely filed and the matter was presented for oral argument on April 8, 2005. (R. 211).

16. The Circuit Court entered the *Order Granting Summary Judgment* on June 17, 2005, (R. 212-228) as to the excess verdict claim under Shamblin.

17. A Petition for Appeal was timely filed and accepted by this Honorable Court.

V. ASSIGNMENT OF ERROR RELIED UPON AND THE MANNER IN WHICH IT WAS DECIDED IN THE CIRCUIT COURT

The Circuit Court granted summary judgment in favor of Farmers & Mechanics holding that the *Assignment and Covenant Not to Execute* rendered the Shamblin first-party bad faith claim unenforceable. The Circuit Court erred on the following grounds:

1. The Circuit Court erred as a matter of law by holding that the insurer did not have a duty to pay the excess judgment against its insured;

2. The Circuit Court erred as a matter of law by holding that a Shamblin claim cannot be assigned prior to a jury verdict; and

3. The Circuit Court erred as a matter of law by holding that the insurer was not "legally obligated to pay" the excess judgment.

VI. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

Insurance is the business of managing risks by which an insured trades the risk of suffering a large unexpected loss for the certainty of a series of small controllable losses in the form of premium payments. See J. Harris, Note: *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation,* 47 Drake L.Rev. 853, 858 (1999).

The insurance contract gives rise to a common law duty of good faith and fair dealing[4] running from an insurer to its insured. Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 352 S.E.2d 73 (1986); Elmore v. State Farm Mut. Auto. Ins. Co., 202 W. Va. 430, 434, 504 S.E.2d 893, 897 (1998). This obligation includes the duty to defend and indemnify. See Tackett v. American Motorists Ins. Co., 213 W. Va. 524, 584 S.E.2d 158 (W. Va. 2003).

[4] The effect of the *Assignment and Covenant Not to Execute* in the instant matter was not limited to just a Shamblin claim. The assignment encompassed all claims "presently existing or which might hereafter arise" whether sounding in contract or tort.

Insurers also have a contractual and implied duty of good faith and fair dealing to settle claims against its insureds. In Syllabus Point 2 of Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766 (1990), this Court held:

> Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has *prima facie* failed to act in its insured's best interest and such failure to so settle *prima facie* constitutes bad faith toward its insured.

As Chief Justice Maynard noted, Shamblin imposes "a powerful incentive to settle claims" so much so that third-party bad faith actions are rendered "unnecessary." Barefield v. DPIC Companies, Inc., 215 W. Va. 544, 568-69, 600 S.E.2d 256, 280-81 (W. Va. 2004) (Maynard, J. concurring in part, dissenting in part).

Although an insurance company has a contractual obligation to defend its insured, it also has a contractually defined limit of exposure to plaintiff's suit. An insurer has an economic incentive not to settle, hoping a jury will bring in a verdict for less than policy limits. But when hope goes awry, the insured is the loser by being personally responsible for the excess. These conflicting interests between the insurer and the insured sometimes cause them to "rub against each other like unmoored rowboats on a placid pond." Pinto v. Allstate Ins. Co., 221 F.3d 394, 396 (2nd Cir. 2000).

Virtually all states impose upon insurance companies a duty to settle liability claims where the insured is likely to be exposed to damages in excess of the insurance policy limits. See State ex rel. Rose v. St. Paul Fire and Marine Ins. Co., 215 W. Va. 250, 599 S.E.2d 673, fn 6 (W. Va. 2004). An insurance company's breach of this duty can result in a "bad faith" lawsuit

against the company to recover the claimant's full damages, regardless of policy limits. Id. (citing Stephen S. Ashley, *Bad Faith Actions: Liability & Damages,* §§ 2:04-06 (2d. ed. 1997)).

An assignment of an insured's bad faith claim to the plaintiff in a personal liability suit is the "ordinary mechanism" for pursuing such claim against the insurer, usually in exchange for a covenant not to execute on the judgment. Pinto v. Allstate Ins. Co., 221 F.3d 394, 403 (2nd Cir. 2000).

The matter *sub judice* involves the assignment of a Shamblin first-party bad faith claim from an insured to a plaintiff prior to a jury verdict. The Circuit Court held the terms and timing of the *Assignment and Covenant Not to Execute* render the Shamblin claim unenforceable against the insurer.

The assignments of error give rise to a discussion of three novel questions of law which are discussed below: (a) whether a Shamblin claim is assignable; (b) whether a "covenant not to execute" releases an insurer's obligation to pay an excess jury verdict; and (c) whether an insured must wait until after an adverse jury verdict before assigning his Shamblin claim to the plaintiff. Finally, your Appellant presents public policy considerations that support the assignment of first-party bad faith claims and submits four new syllabus points for consideration.

A. West Virginia Law Supports and a Majority of Jurisdictions Permit the Assignment of a Bad Faith Claim

The practice of assigning an insurance bad faith claim is commonplace in West Virginia and has been mentioned in the procedural history of several reported cases. Aluise v. Nationwide Mut. Fire Ins. Co., 218 W. Va. 498, 625 S.E.2d 260 (W. Va. 2005); Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 584 S.E.2d 176 (W. Va. 2003); Meadows v. Wal-Mart Stores, 207 W. Va. 203, 220-221, 530 S.E.2d 676, 693-694 (W. Va. 2000); Berardi v. Meadowbrook Mall Co., 212 W. Va. 377, 572 S.E.2d 900 (W. Va. 2002); Hustead v. Ashland Oil, 197 W. Va.

55; 475 S.E.2d 55 (W. Va. 1996); Jordache Enters., Inc. v. National Union Fire Ins. Co., 204 W. Va. 465, 513 S.E.2d 692 (W. Va. 1998); Gum v. Dudley, 202 W. Va. 477, 487, 505 S.E.2d 391, 401 (W. Va. 1997); Toler v. Shelton, 157 W. Va. 778, 204 S.E.2d 85 (W. Va. 1973).

However, the instant matter is the first opportunity the Court has taken to examine the merits and mechanics of such a claim. The threshold issue is "whether West Virginia law allows for the assignment" of a first-party bad faith claim. See Johnson v. Acceptance Ins. Co., 292 F. Supp. 2d 857 (N.D. W. Va. 2003) (noting the absence of controlling precedent in West Virginia and finding West Virginia would permit such an assignment).[5]

Farmers & Mechanics concedes that West Virginia law supports the assignment of a first-party bad faith claim and makes a compelling argument in the pleadings below.[6] (R. 36-37). Under West Virginia law, "[a]ll common law rights of action may be assigned which, upon the death of the party, would pass to his legal representative." Cook v. Eastern Gas & Fuel Associates, 129 W. Va. 146, 155, 39 S.E.2d 321, 326 (W. Va. 1946). The assignee "steps into the shoes" of the assignor and takes the assignment subject to all prior equities between previous parties. His situation is no better than that of the assignor. Id. (citing Thomas v. Linn, 40 W. Va. 122, 20 S.E. 878 (W. Va. 1894).

An assignment of a chose of action is also authorized by statute. W. Va. Code § 55-8-9 authorizes the "assignee of any bond, note, account, or writing, not negotiable, or other chose in

---

[5] Johnson v. Acceptance Ins. Co. is a 2003 federal district court case arising out of the Northern District of West Virginia. The federal Court considered the enforcement of a consent judgment above policy limits under West Virginia law. The enforcement of a consent judgment in excess of policy limits presents a far more difficult decision, one not ripe for consideration here. See Johnson v. Acceptance Ins. Co., 292 F. Supp. 2d 857 (N.D. W. Va. 2003) (holding a consent judgment coupled with a covenant not to execute is enforceable as far as the policy limits allow); see also Romstadt v. Allstate Ins. Co., 59 F.3d 608 (6th Cir. 1995); Whatley v. City of Dallas, 758 S.W.2d 301 (Tex. App.-Dallas 1988).

[6] Farmers & Mechanics position in this regard is dictated by its litigation strategy. If the assignment is invalid, then arguably the excess judgment is again enforceable against Sullivan. In order to avoid responsibility for the excess verdict, Farmers & Mechanics must argue the Shamblin claim is assignable – but unenforceable.

action *arising out of a contract* or injury to personal or real property, to maintain any action in his own name without the addition of 'assignee' which the original obligee, promisee, payee, contracting party, or owner of such chose in action, might have brought, [and includes] a demand *arising upon the contract, express or implied.*" Cook v. Eastern Gas & Fuel Associates, 129 W. Va. at 154-155, 39 S.E.2d at 326 (emphasis added).

A first-party bad faith action is a chose of action "*which arises out of a contract*" between an insured and an insurer. See Elmore v. State Farm Mut. Auto. Ins. Co., 202 W. Va. 430, 434, 504 S.E.2d 893, 897 (1998) (holding the "common law duty of good faith and fair dealing in insurance cases under our law runs between insurers and insureds and is based upon on the existence of a contractual relationship"). A Shamblin claim, being a chose of action arising out of the duty of good faith and fair dealing by an insurer to an insured, is therefore assignable under the common law and authorized by the West Virginia Code.

B. West Virginia Law Supports and a Majority of Jurisdictions Permit the Use of a "Covenant Not to Execute"

The Circuit Court of Barbour County did not address the assignability of the Shamblin claim thereby implicitly approving the same. However, the Circuit Court held that "when an insured is completely protected from personal liability to a third-party claimant by a covenant not to execute, the insurance carrier is not under any duty to pay the excess judgment against the insured since the insured is no longer legally obligated to pay the judgment." See *Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Motion for Summary Judgment as to "Shamblin" Cause of Action* at ¶ 17 on p. 13. Specifically, the Court explained that "if [Mr. Sullivan] has no liability for the excess verdict then his insurer can have no liability." See April 4, 2005 hearing transcript at pp. 22-23. (R. 211). The Circuit Court interpreted the "covenant not to execute" as a release.

The interpretation and application of a "covenant not to execute" is an issue of first impression in West Virginia. However, many other jurisdictions have addressed the issue. A survey of cases reveals a lop-sided split of authority with an overwhelming majority permitting the assignment of a bad faith claim when coupled with a covenant not to execute. A minority of cases, relied upon by the Circuit Court below, sometimes refuse enforcement of assignments in the context of consent judgments.[7]

For the reasons set forth below, the Circuit Court erred as a matter of law by adopting and thereafter misapplying the minority rule.

---

[7] Consent judgments are sometimes referred to as stipulated judgments, "Damron" agreements, "Miller/Shugart" agreements, or "Mary Carter" agreements. See Damron v. Sledge, 460 P.2d 997 (Ariz. 1969) (landmark case from the Supreme Court of Arizona); Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982) (landmark case from the Supreme Court of Minnesota). Consent judgments are largely recognized as an appropriate and reasonable procedural remedy available to an insured following the refusal by an insurer to indemnify an insured against a liability claim and/or under circumstances wherein an insurer defends under a reservation of rights. See Restatement (Second) of Judgments, §57-58 (1982); Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 Drake L. Rev. 853 (1999); Steven Plitt, *The Evolving Boundaries of Damron/Morris Agreements: A Search for the Missing Link, A Judicial Determination of the Length of a Reasonable Person's Arm, and Other Progressive Issues*, 35 Ariz. St. L.J. 1331 (2003); Steven L. Pain, et al., *California Practicum: Recent Developments in California Insurance Law: Enforceability of Stipulated Judgments Against Insurance Carriers*, 22 Pepp. L. Rev. 1017 (1995); Chris Wood, Note: *Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 Tex. L. Rev. 1373 (1997); Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 Den. U. L. Rev. 29 (2000); Timothy D. Howell, *So Long "Sweetheart"- State Farm & Casualty Co. v. Gandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 St. Mary's L. J. 47 (1997); Michael J. Brady et al., *Demise of the Stipulated Judgment as a Basis for Bad Faith Actions*, 60 Def. Couns. J. 59 (1993); 1 R. Long, The Law of Liability Insurance § 5.14 (1983); Sheldon R. Shapiro, *Modern Views of State Courts as to Whether Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect*, 91 A.L.R.3d 1170, (1979); E. H. Schopler, *Right to Appellate Review of Consent Judgment*, 69 A.L.R.2d 755, (1960); E. H. Schopler, *Conclusiveness and Effect, Upon Surety, of Default or Consent Judgment against Principal*, 59 A.L.R.2d 752, (1958); Richard D. English, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith In, or Comply with Agreement made in Mediation*, 43 A.L.R.5th 545, (1996); 1-3 Insurance Bad Faith Litigation § 3.08: Recoverable Damages for Breach of Duty to Settle (2004); 1-3 Insurance Bad Faith Litigation § 3.14: Insurer's Procedural Options When Questions of Coverage Arise (2004); Stuart N. Rappaport, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. Ill. L. Rev. 731 (1987); Ellen S. Pryor, *The Tort Liability Regime and the Duty to Defend*, 58 Md. L. Rev. 1 (1999); J. Michael Phillips, *Looking Out for Mary Carter: Collusive Settlement Agreements in Washington* Tort Litigation, 69 Wash. L. Rev. 255 (1994).

1. The Circuit Court erred by rejecting the Majority Rule regarding a covenant not to execute.

An overwhelming majority of jurisdictions permit the assignment of a bad faith claim when coupled with a covenant not to execute. Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995) (**landmark case**); Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128 (D.C. Cir. 1989) (**landmark case**); J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America, 696 N.W.2d 681 (Mich. 2005); Wangler v. Lerol, 670 N.W.2d 830 (N.D. 2003); Guillen ex rel. Guillen v. Potomac Ins. Co., 785 N.E.2d 1 (Ill. 2003); Stateline Steel Erectors, Inc. v. Shields, 837 A.2d 285 (N.H. 2003); Pinto v. Allstate Ins. Co., 221 F. 3d 394 (2nd Cir. 2000); Kobbeman v. Oleson, 574 N.W.2d 633 (S.D. 1998); Ayers v. C& D General Contractors, 269 F. Supp. 2d 911 (W.D. Ct. Ky. 2003); Glenn v. Fleming, 799 P.2d 79 (Kan. 1990); Franco v. Selective Ins. Co., 184 F.3d 4 (1st Cir. 1999) (applying Maine law); Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051 (Wyo. 2002); Tip's Package Store, Inc. v. Commercial Ins. Managers, Inc., 86 S.W.3d 543 (Tenn. Ct. App. 2001); Campione v. Wilson, 661 N.E.2d 658 (Mass. 1996); McLellan v. Atchison Ins. Agency Inc., 912 P.2d 559 (Haw. Ct. App. 1996). See also J. Harris, Note: *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 Drake L.Rev. 853, 858 (1999) (trend "seems to lean overwhelmingly toward the majority rule" that upholds assignment of insurance claim accompanied by covenant not to execute on judgment).

The majority rule considers a covenant not to execute "merely a contract and not a release." Red Giant Oil Co. v. Lawlor, 528 N.W.2d at 534. Covenants not to execute are different from releases, as the legal liability remains in force against those who have covenants, whereas a release represents "total freedom from liability." Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1133. See also Kobbeman v. Oleson, 574 N.W.2d at 636 (A covenant not to execute is

"merely a contract, and not a release, such that the underlying tort liability remains and a breach of contract action lies in favor of the insured if the injured party seeks to collect his judgment."); J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America, 696 N.W.2d at 684 ("A release immediately discharges an existing claim or right. In contrast, a covenant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action. The difference primarily affects third parties, rather than the parties to the agreement."); Stateline Steel Erectors, Inc. v. Shields, 837 A.2d 285 at 290 ("Unlike a release, covenant not to sue does not relinquish a right of claim, or extinguish a cause of action. A covenant not to sue recognizes the continuation of the obligation or liability; the party making the covenant not to sue agrees only not to assert any right or claim based upon the obligation").

The *Assignment and Covenant Not to Execute* in the matter *sub judice*, by its very terms, is a settlement agreement --- not a release. "The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." DeVane v. Kennedy, 205 W. Va. 519, 519 S.E.2d 622, Syl. Pt. 6 (W. Va. 1999).[8]

The *Assignment and Covenant Not to Execute* clearly contemplates the preservation of the Shamblin action through an assignment to Appellant. The agreement unequivocally states that any release from liability shall "in no way affect Plaintiffs' right to seek a judgment in the Civil Action against Earl Sullivan so long as Plaintiffs limit their source of recovery on any such

[8] Even if the agreement is deemed a release, this Court has held that a "release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution." Woodrum v. Johnson, 210 W. Va. 762, 559 S.E.2d 908, Syl. Pt. 2 (W. Va. 2001).

judgment to Farmers & Mechanics Mutual Insurance Company [...]." See ¶ V of *Assignment and Covenant Not to Execute.* (R. 54).

Moreover, the covenant not to execute is not absolute but, rather, is conditioned on the covenantee, Sullivan, performing certain duties in the litigation against Farmers & Mechanics. Earl Sullivan is required to "take whatever action is reasonably necessary in order that the rights assigned [...] be preserved, maintained and exercised, including but not limited to giving full cooperation to Farmers & Mechanics Mutual Insurance Company in the defense of the Civil Action." See ¶ III of *Assignment and Covenant Not to Execute.* (R. 54). A breach by Sullivan of his contractual duty to participate in the Shamblin case renders the agreement void thereby imposing liability upon Sullivan for the excess judgment. Thus, Sullivan is not "totally free from liability." Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1133. Sullivan's agreement is conditional.

The *Assignment and Covenant Not to Execute* should not be considered a full and final release.[9] Rather, the terms and conditions of the settlement agreement should be enforced to effectuate the intention of the parties; to wit, the assignment of a Shamblin cause of action from the insured to the prevailing Plaintiff. The covenant not to execute should not be read to defeat the very purpose of the assignment.

[9] The Second Circuit took one step further holding the "exchange of a general release for an assignment of a bad faith claim operates to preserve the bad faith claim, as if the parties had executed a covenant not to sue [...]. While conscious that more careful drafting would have avoided this issue by using the more conventional form of consideration for the assignment, we decline defendant's invitation to exalt form over the spirit of the agreement and to interpret New York law to establish a rule unknown in other jurisdictions and contrary to the prevailing view of New York courts and the intention of the parties in the underlying action. Pinto v. Allstate Ins. Co., 221 F.3d 394 at 404.

2. The Circuit Court misinterpreted the Minority Rule regarding a covenant not to execute.

Farmers & Mechanics argues the assignment and covenant not to execute are self-contradicting. The insurance company argues that the "release" nullifies the assignment of the claim because it extinguishes the basis for the assignment. Hence, the assignment of the Shamblin claim is worthless upon transfer. Such a "metaphysical contention" has been roundly rejected by a majority of jurisdictions. See Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d at 1133.

The leading case cited by Farmers & Mechanics is Freeman v. Schmidt Real Estate & Ins., 755 F.2d 135 (8th Cir. 1985) wherein the Eighth Circuit held that an insured protected by a covenant not to execute has no compelling obligation to pay any sum to the injured party; thus, the insurance policy imposes no obligation on the insurer.

The Freeman decision was a diversity case applying Iowa law. At the time of the Freeman decision, the issue had not been squarely decided by the Iowa Supreme Court. Ten years later, the Iowa Supreme Court **reached a different conclusion** in Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995). Freeman is no longer the law in Iowa. To the contrary, Red Giant is now the prevailing rule of law not only in Iowa, but also in virtually every other jurisdiction that has addressed the question since that time.

Moreover, the minority rule relied upon by Farmers & Mechanics is only applicable to consent judgment cases. The landmark case stating the minority rule is State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996) (not cited by the Appellee below). In Gandy, the Supreme Court of Texas considered the enforceability of a convoluted and contrived Six Million Dollar ($6,000,000.00) consent judgment above policy limits. The Gandy Court invalidated the

assignment of the bad faith claim on public policy grounds. Nonetheless, the Gandy Court qualified its holding by noting:

> Not every settlement involving an assignment of rights in exchange for a covenant to limit the assignor's liability has the problems we have described [in Gandy]. For example, as we have said, if the settlement follows an adversarial trial, the difficulties in evaluating P's claim are no longer present. That value has been fairly determined. We should not invalidate a settlement that is free from this difficulty simply because it is structured like one that is not.

State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d at 715. Even Texas, the most conservative of all judicial philosophies regarding consent judgments, permits the use of a covenant not to execute. The reference to a settlement that "follows" an adversarial trial is a distinction without a difference where, as here, the trial was vigorously defended and no collusion is alleged or asserted.

Simply stated, every jurisdiction in the country permits the assignment of a bad faith claim when coupled with a covenant not to execute to some extent. A covenant not to execute does not automatically bar enforcement. It is erroneous to cite to the minority rule as rendering a judgment unenforceable simply because of a covenant not to execute.

3. The Circuit Court misapplied the Minority Rule regarding a covenant not to execute

Gandy, Freeman and all the cases cited by Farmers & Mechanics are distinguishable from the instant matter because none of them involves an excess verdict. All the cases cited in the *Order Granting Summary Judgment* involve a consent judgment in the absence of a full adjudication. Freeman v. Schmidt Real Estate & Ins., *supra,* ($350,000.00 consent judgment); Wilcox v. American Home Assurance Co., 900 F. Supp. 850 (S.D. Ct. Tex. 1995) ($10,000,000.00 consent judgment); Lida Mfg. Co., Inc. v. U.S. Fire Ins. Co., 448 S.E.2d 854

(N.C. App. 1994) ($1,000,000.00 consent judgment); Huffman v. Peerless Ins. Co., 193 S.E.2d 773 (N.C. App. 1973) ($20,000.00 consent judgment); Whatley v. City of Dallas, 758 S.W.2d 301 (Tex. App.-Dallas 1988)[10] (consent judgment); Oregon Mut. Ins. Co. v. Gibson, 746 P.2d 245 (Or. App. 1987) ($1,500,000.00 consent judgment); Bendall v. White, 511 F. Supp 793 (N.D. Ala. 1981) ($900,000.00 consent judgment).

It is important to note that the two Texas cases cited by Farmers & Mechanics, namely Wilcox v. American Home Assurance Co., 900 F. Supp. 850 (S.D. Ct. Tex. 1995) and Whatley v. City of Dallas, 758 S.W.2d 301 (Tex. App.- Dallas 1988), both enforced consent judgments up to policy limits (Wilcox was paid policy limits of $500,000.00 and Whatley was paid policy limits of $100,000.00). Both invalidated the consent judgments above policy limits. **Neither** Texas consent judgment case involved a Stowers claim (the Texas equivalent to a Shamblin claim).

A consent judgment is not an adjudication. The judgment is binding and valid as to the insured, but not conclusive as to the insurer. Red Giant Oil Co. v. Lawlor, 528 N.W.2d at 534. Although most courts agree that a consent judgment coupled with a covenant not to execute is enforceable, they have taken diverse approaches to determining reasonableness or collusion. Ayers v. C& D General Contractors, 269 F. Supp. 2d at 916 (surveying three approaches regarding which party should bear the burden of proof).

The instant matter involves a full adjudication in excess of policy limits. None of the cases cited by Farmers & Mechanics, and no jurisdiction known to the Appellant, applies the minority rule to the assignment of an excess verdict. To the contrary, as noted above, an assignment coupled with a covenant not to execute is recognized as the "ordinary mechanism"

[10] The Whatley Court noted it expresses "no opinion as to whether a judgment creditor may recover against an insurer damages awarded against its insured in excess of policy limits for which the insured is not personally liable if the insurer has acted negligently or in bad faith." Whatley v. City of Dallas, 758 S.W.2d at fn. 6.

following an excess verdict. Pinto v. Allstate Ins. Co., 221 F.3d 394, 403 (2nd Cir. 2000); J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America, 696 N.W.2d 681 (Mich. 2005); Glenn v. Fleming, 799 P.2d 79 (Kan. 1990).

Farmers & Mechanics' attempt to invalidate this Shamblin claim premised upon a technicality is without merit. As appropriately noted by the Supreme Court of New Hampshire[11] and the Supreme Court of Iowa: "We fail to see why legally it should make any difference who sues the [insurer] – the insured or the insured's assignee." Stateline Steel Erectors, Inc. v. Shields, 837 A.2d at 289; Red Giant Oil Co. v. Lawlor, 528 N.W.2d at 533.

C. The Circuit Court erred as a matter of law by holding that a Shamblin claim cannot be assigned prior to a jury verdict.

The Circuit Court ruled as a matter of law that a Shamblin claim cannot be assigned prior to a jury verdict. See *Order Granting Summary Judgment* at ¶¶ 7, 8 on pp. 8-9. In so ruling, the Circuit Court accepted the invitation of Farmers & Mechanics to invent a new element by holding that a "Shamblin claim cannot attach unless and until there is an excess verdict ***wherein the insured's personal assets were still at stake at the point in time the excess verdict was rendered***." See *Order Granting Summary Judgment* at ¶ 8 on p. 9 (emphasis added). This extrapolation is unsupported by West Virginia law.

The damages in a Shamblin claim ripen following entry of the excess verdict. The bad faith conduct giving rise to the Shamblin claim necessarily precedes the verdict. "When [Farmers & Mechanics] rejected the settlement offers, it subjected itself to liability for the excess damages incurred by its insured." Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. at 596, 396 S.E.2d at 777. There is no law that requires the insured's assets to be at stake when the excess verdict is returned. "Whether the assignment was made of a judgment in existence or a

[11] This Honorable Court cited and relied heavily upon New Hampshire precedent in Dumas v. Hartford Accident & Indemn. Co., 56 A.2d 57 (N.H. 1947) when deciding the Shamblin case.

judgment to come into existence is not determinative of whether or not the insured's assignee may maintain an action against the insurance company. Rather, the language of the covenant is determinative." Lancaster v. Royal Ins. Co. of America, 726 P.2d 371, 374 (Or. 1986) (*en banc*).

It should make no difference whether an assignment of a Shamblin claim precedes or follows an excess verdict. The risk to the insured arises when a settlement offer within policy limits is rejected. The risk becomes reality after an adverse verdict in the absence of an assignment which protects the rights of an insured.

If, as here, the insured is offered a settlement agreement which effectively relieves him of any personal liability, surely it cannot be said it is not in his best interest to accept the offer. Nor should the insurer compel its insured to forego such a settlement. To take a position otherwise is *prima facie* evidence of a breach of the insurer's duty of good faith and fair dealing to its insured. A benevolent insurer should agree to indemnify its insured in excess of policy limits prior to trial when playing "we bet your house." Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. at 599, 396 S.E.2d at 780 (Neeley, J., concurring).

Adopting a rule, which requires an insured to wait until after verdict to assign a Shamblin claim, imposes a significant risk to the insured --- certainly a greater risk than one of potential fraud or collusion. A prevailing plaintiff may choose to enforce judgment rather than pursue an assignment of a Shamblin claim (especially since a Shamblin claim is "not an entitlement to recovery"[12] and may encompass several years of additional litigation). An insured with substantial corporate or personal assets may not have the option of assigning his Shamblin claim after a verdict is returned and, worse, may not have the financial wherewithal to survive the duration of a Shamblin claim to obtain reimbursement of the funds expended to satisfy the same.

[12] See *Order Granting Summary Judgment* at ¶5.

An insured exposed by his insurer to the sharp thrust of personal liability need not indulge in financial masochism. Arizona Prop. And Cas. Ins. Guaranty Fund v. Helme, 735 P.2d 451, 459 (Ariz. 1987).

Third, assignment of a Shamblin action prior to adjudication, at worst, gives rise to the fear of potential of collusion. Perhaps, the insured may lose the incentive to contest liability or the extent of the injured party's damages in negotiations or trial. See Freeman v. Schmidt Real Estate & Ins., 755 F.2d at 139. Of course, an assignee "steps into the shoes" of the assignor and takes the property subject to all defenses to which the assignor is subject. Cook v. Eastern Gas & Fuel Associates, 129 W. Va. at 155, 39 S.E.2d at 326; Red Giant Oil Co. v. Lawlor, 528 N.W.2d at 533. It is open to the insurer to raise the issue of collusion, and if a satisfactory basis exists, to argue it to the finder of fact. Campione v. Wilson, 661 N.E.2d at 663.

Fear that fraud or collusion is possible should not be the test. West Virginia rejected a similar argument when abolishing spousal immunity.[13] "The possibility of collusion exists to a degree in the trial of any case. However, through prompt and efficient investigation by the insurance company and active participation by counsel representing both parties, our juries and trial courts have constantly performed the function of distinguishing the frivolous from the substantial, the fraudulent from the meritorious." Lee v. Comer, 159 W. Va. 585, 593, 224 S.E.2d 721, 725 (W. Va. 1976).

Finally, there is absolutely no indication, allegation, argument and/or evidence that collusion taints the jury verdict in *Strahin I.*

[13] *Cf.* Red Giant Oil Co. v. Lawlor, 528 N.W.2d at 534 ("We rejected a similar argument in disposing of interspousal immunity, noting that our system of justice is adequately equipped to discern the existence of fraud and collusion.")

D. The Circuit Court erred by holding that Farmers & Mechanics has no contractual duty to pay an excess verdict where the assets of the insured are protected by a covenant not to execute

The Circuit Court held "the insurance company is not under a duty to pay the excess judgment against the insured since the insured is no longer legally obligated to pay the judgment." See *Order Granting Summary Judgment* at ¶17 on p. 13.

Such an argument is tantamount to adopting the antiquated "payment" rule regarding excess verdicts. See Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128, 1131-32 (D.C. Cir. 1989). The payment rule required payment of the excess verdict prior to seeking reimbursement from an insurer. A majority of jurisdictions follow the "judgment rule" which states "entry of judgment in excess of policy limits alone is sufficient damage to sustain recovery from an insurer for its breach of duty." Id. at 1131; see also Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128 (D.C. Cir. 1989); Glenn v. Fleming, 799 P.2d 79 (Kan. 1990); McLellan v. Atchison Ins. Agency Inc., 912 P.2d 559 (Haw. Ct. App. 1996).

Moreover, the Farmers & Mechanics insurance policy does not define "legally obligated to pay." At best, this language is ambiguous. See Red Giant Oil Co. v. Lawlor, 528 N.W.2d at 533. When the words of an insurance policy are, without violence, susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted. Farmers Mut. Ins. Co. v. Tucker, 213 W. Va. 16, 576 S.E.2d 261, Syl. Pt. 2 (2002).

Sullivan was "legally obligated to pay" when the tortious conduct occurred; not when the verdict was returned by the jury. Such a proposition is supported by the fact that thousands of insurance claims are paid in the absence of litigation – let alone entry of judgment. To hold otherwise would force the adjudication of every insurance claim in the State of West Virginia to

trigger the insured's "legal obligation to pay." Judgment is not a factual predicate to triggering insurance coverage.

Farmers & Mechanics' narrow interpretation of the insurance policy produces an absurd result. After all, if the covenant not to execute extinguishes the Shamblin claim simultaneously with the assignment, that would also be true of the part of the verdict within policy limits. However, Farmers & Mechanics has already tendered the policy limits in recognition of its "legal obligation to pay." Such an intrinsic contradiction renders a narrow construction of the insurance policy fatally flawed. Reliance on the terms of the insurance policy to avoid responsibility for the excess verdict is misplaced.

E. Assignments of first-party bad faith cases support the public policy of safeguarding the assets of tortfeasors insured under a policy of liability insurance

It is beyond cavil that the original Shamblin doctrine was created to protect policyholders who purchase insurance to safeguard their hard-won personal estates and then find these estates needlessly at risk because of the intransigence of an insurance carrier. Charles v. State Farm Mut. Auto. Ins. Co., 192 W. Va. 293, 298, 452 S.E.2d 384, 389 (1994).

Assignments are an appropriate means to protect an insured's personal assets and promote the purpose of the Shamblin doctrine. In fact, assignments further the public policy by shifting the burden to the plaintiff to collect on the excess verdict. It should not be overlooked that Shamblin adopted a hybrid "strict liability/negligence" standard that does not guarantee recovery. Assigning a Shamblin claim in exchange for a covenant not to execute is the only guarantee that protects the insured's assets following an adverse jury verdict.

Adopting the position advocated by Farmers & Mechanics does not promote the protection of its insureds. Severely limiting the assignment of a Shamblin claim will essentially

end the practice amongst the trial bar. No plaintiff will enter into an assignment before or after verdict, for fear that an insurer will spring a "gotcha" and refuse to pay. Rather, the prevailing plaintiff will opt to enforce the judgment against the insured and force the hand of the insurer.

Adopting the position advocated by Farmers & Mechanics eviscerates the public policy announced in Shamblin and described by Justice Maynard in his dissent in Barefield v. DPIC, *supra*.

F. Proposed New Syllabus Points

Your Appellant respectfully submits the following new syllabus points for consideration:

1. A first-party bad faith claim by an insured to an insurer is assignable under the common law and W. Va. Code § 55-8-9.

2. A covenant not to execute is a contract and not a release. Legal liability remains in force against those who have covenants, whereas a release represents freedom from liability. A covenant not to execute is appropriate consideration for the assignment of a bad faith claim and does not negate an insurer's legal obligation to pay an excess verdict.

3. A first-party bad faith claim may be assigned prior to or following entry of judgment and is enforceable in the absence of fraud or collusion.

4. An assignee "stands in the shoes" of the insured following assignment of a first-party bad faith claim and is subject to all defenses that may be asserted by the insurer.

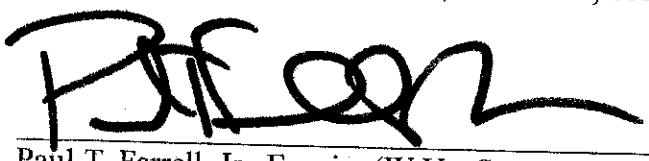
VII. PRAYER FOR RELIEF

Appellant respectfully requests this Honorable Court to reverse the *Order Granting Summary Judgment* regarding the Shamblin claim and remand the matter to the Circuit Court of Barbour County to proceed on the merits of all claims asserted and/or any other relief this Honorable Court deems fair and just.

RESPECTFULLY SUBMITTED,

DANIEL R. STRAHIN
BY COUNSEL

GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL



Paul T. Farrell, Jr., Esquire (W.Va. State Bar #7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL
419 Eleventh Street
Post Office Box 2389
Huntington, West Virginia 25724-2389
(304) 525-9115
(304) 529-3284 (fax)

---and---

THE COCHRAN FIRM, DC

Stephen D. Annand, Esquire (W.Va. State Bar #150)
THE COCHRAN FIRM, DC
1100 New York Avenue, N.W.
Suite 250, West Tower
Washington, D.C. 20005
(202) 682-5800
(202) 408-8851 (fax)

Counsel for the Appellant

CERTIFICATE OF SERVICE

I, Paul T. Farrell, Jr., Esq., do hereby certify that I have filed and forwarded by United States Mail the **"Brief of the Appellant"** and served the same upon the following counsel of record by mailing a true copy thereof, by United States mail, postage prepaid, on this 8th day of September, 2006:

James A. Varner, Sr., (W. Va. State Bar No. 3853)
Tiffany R. Durst (W.Va. State Bar No. 7441)
Debra Tedeschi Herron (W.Va. State Bar No. 6501)
McNEER, HIGHLAND, McMUNN & VARNER, L.C.
Post Office Drawer 2040
Clarksburg, West Virginia 26302-2040
--Counsel for the Defendant/Respondent, Farmers and Mechanics Mutual Insurance Company of West Virginia, Inc.

The Honorable Alan D. Moats
Circuit Judge of Barbour County
8 North Main Street
Phillipi, West Virginia 26416-1140

An original and (9) copies have been filed with the Clerk of the Supreme Court.

Paul T. Farrell, Jr., Esq. (W.Va. State Bar #7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL.
419 Eleventh Street
Post Office Box 2389
Huntington, West Virginia 25724-2389
Phone: (304) 525-9115
Fax: (304) 529-3284
paul@gkbtlaw.com